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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	7
THE COURT SHOULD HOLD THAT A NO-IMPEACHMENT RULE MAY NOT BAR EVIDENCE OF RACIAL BIAS OFFERED TO PROVE A SIXTH AMENDMENT VIOLATION	7
I. THE SIXTH AND FOURTEENTH AMENDMENTS TOGETHER REFLECT A CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT	7
II. THIS COURT'S CASES HAVE LONG REFLECTED THE IMPORTANCE OF RACE-BLIND DECISIONMAKING IN THE JURY CONTEXT	18
III. APPLYING STATE NO-IMPEACHMENT RULES IN THE CONTEXT OF ALLEGATIONS OF RACIAL BIAS UNDERMINATES OUR CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT	23
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases

Aldridge v. United States,
283 U.S. 308 (1931) 6, 7, 21

Batson v. Kentucky,
476 U.S. 79 (1986) 22, 23

Cassell v. Texas,
339 U.S. 282 (1950) 19

Castaneda v. Partida,
430 U.S. 482 (1977) 19

Foster v. Chatman,
136 S. Ct. 1737 (2016) 23

Georgia v. McCollum,
505 U.S. 42 (1992) 24

Ham v. South Carolina,
409 U.S. 524 (1973) 21

Hernandez v. Texas,
347 U.S. 475 (1954) 6

Holland v. Illinois,
493 U.S. 474 (1990) 20, 21

Ristaino v. Ross,
424 U.S. 589 (1976) 22

Rosales-Lopez v. United States,
451 U.S. 182 (1981) 22

Rose v. Mitchell,
443 U.S. 545 (1979) 6, 18, 19, 25

TABLE OF AUTHORITIES – cont'd.

Page(s)

Strauder v. West Virginia,
100 U.S. 303 (1879) 6, 19, 25

Taylor v. Louisiana,
419 U.S. 522 (1975) 20

Turner v. Murray,
476 U.S. 28 (1986) 22

United States v. Burr,
25 F Cas. 49 (C.C.D. Va. 1807) 2, 9

Vasquez v. Hillery,
474 U.S. 254 (1986) 20

Constitutional Provisions and Legislative Materials

2 Cong. Rec. (1874) 15, 16

3 Cong. Rec. (1875) 6, 14, 15, 17

Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.) 11

Cong. Globe, 39th Cong., 1st Sess. (1866) 9

Cong. Globe, 42d Cong., 1st Sess. (1871) 10, 11, 12

Cong. Globe, 42d Cong., 1st Sess. App. (1871) 11

Cong. Globe, 42d Cong., 2d Sess. (1872) 5, 13, 14, 15, 16

TABLE OF AUTHORITIES – cont'd.

Page(s)

U.S. Const. amend. VI 4, 5, 7

U.S. Const. amend. XIV, § 1 ..... 5, 10

Books, Articles, and Other Authorities

2 Joseph Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) 8

3 J.H. Thomas, *A Systematic Arrangement of Lord Coke's First Institute of the Laws of England* (1836) 8

3 William Blackstone, *Commentaries* 7, 8

4 William Blackstone, *Commentaries* 7

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) 4, 8

Jacobus tenBroek, *Equal Under Law* (1965) 10

James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895 (2004) 5, 10, 11, 12, 13

Message from the President of the United States, Transmitting a Memorial of a Convention of Colored Citizens Assembled in the City of Montgomery, Ala. on December 2, 1874, H. Exec. Doc No. 46 (1874) 16, 17

TABLE OF AUTHORITIES – cont'd.

Page(s)

Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress (1866) 9, 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Central to the constitutional guarantee that all persons are entitled to a "speedy and public" trial by jury is the idea that the members of that jury must be "impartial." Made explicit in the constitutional text itself, this commitment to an "impartial" jury reflects the Framers' belief that a defendant should be convicted of a crime based solely on the evidence presented at trial, not on preexisting juror biases or preconceptions. As Chief Justice John Marshall wrote, "The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

tribunal which may be expected to be uninfluenced by an undue bias of the mind." *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). This case presents allegations of juror bias that, if credited, leave no doubt that the defendant's Sixth Amendment right to an impartial jury was violated. Applying a state no-impeachment rule in this context and thereby allowing this potential constitutional violation to go unaddressed, as the Colorado Supreme Court did, undermines this nation's longstanding historical and constitutional commitment to race-blind decision-making in the jury context. The judgment of the Colorado Supreme Court should be reversed.

In May 2007, a man entered a women's bathroom at a horse-racing track and asked two teenage sisters inside if they wanted to drink beer or "party." When they said no, the man turned off the lights, grabbed one girl's shoulder and unsuccessfully tried to touch her breast, and grabbed the other girl's shoulder and buttocks. The sisters reported the incident to their father, an employee of the racetrack; based on their description of the assailant, he concluded that it was petitioner Miguel Angel Peña Rodriguez. Late that night, the girls identified Peña Rodriguez as their assailant based on a show-up in which Peña Rodriguez was standing on the side of the road and the girls were in a police cruiser, about fifteen feet away.

Based on the incident, Peña Rodriguez was charged with four offenses: one felony count of attempted sexual assault on a victim less than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Insisting that he had been misidentified, Peña Rodriguez requested a trial. At trial, the prosecution emphasized the victims' pretrial and in-court identifications of Peña Rodriguez, while the defense counsel called

into question the reliability of those identifications. Peña Rodriguez also presented an alibi witness, who testified that he was with Peña Rodriguez when the offenses occurred. The prosecution encouraged the jury to "'[w]eigh the credibility of the girls against [the credibility of the alibi witness].'" Pet'r's Br. 6 (quoting Tr. 48 (Feb. 25, 2010)).

Although the jury was initially unable to reach a verdict, the judge urged the jury to keep deliberating. After twelve total hours of deliberations, the jury convicted Peña Rodriguez on the three misdemeanor charges; the jury was unable to reach a verdict on the felony charge. After the jury was dismissed, two of its members spoke to defense counsel and explained that during deliberations another juror had "'expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic.'" Pet. App. 4a. According to these jurors, the other juror said that the defendant "'did it because he's Mexican and Mexican men take whatever they want,'" and that "'Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.'" *Id.*; *see id.* ("'Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women.'"). Finally, these jurors reported that the other juror also discounted the testimony of Peña Rodriguez's alibi witness, saying he was not "credible because, among other things, he was 'an illegal,'" *id.* at 4a-5a (internal quotation marks omitted), even though the witness had testified at trial that he was a legal resident, Pet'r's Br. 8.

Despite these allegations that racial prejudice infected the jury's verdict, the trial court concluded that nothing could be done because Colorado's no-impeachment rule barred inquiry into "'what hap-

pen[ed] in the jury room.'" Pet'r's Br. 9 (quoting J.A. 125). Divided panels of both the Colorado Court of Appeals and the Colorado Supreme Court affirmed. Pet. App. 28a; *see id.* at 1a. *Amicus* submits this brief to demonstrate that allowing no-impeachment rules to bar evidence of racial prejudice in jury deliberations is at odds with this nation's longstanding historical and constitutional commitment to jury deliberations that are free of racial bias.

When the Framers drafted our enduring charter, they enshrined the right to a jury trial in the original Bill of Rights, U.S. Const. amend. VI, viewing it as critical to a system of ordered liberty, *see* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96-97 (1998) ("[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."). As the Amendment's text makes clear, critical to the Framers' conception of a jury was the idea that it be "impartial," U.S. Const. amend VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury"), capable of reaching verdicts based only on the evidence presented in court and not on preconceived biases about the parties.

Although the Framers' original conception of bias focused on jurors who knew one of the parties or had some other interest in the case, the Constitution's explicit requirement that jurors be "impartial" also prohibits jurors who have racial biases or prejudices that would affect their ability to dispassionately assess the evidence presented in court. Indeed, in the aftermath of the Civil War, experiences in the South "challenged" the "colonial belief that the jury was a bulwark of liberty," as it became clear that racial biases

were infecting jury deliberations with "[a]ll-white juries punish[ing] black defendants particularly harshly, while simultaneously refusing to punish violence by whites against blacks and Republicans." James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 909-10 (2004). In response, Congress passed two pieces of legislation designed to guard against racial prejudices infecting Southern juries: the Civil Rights (Ku Klux Klan) Act of 1871, which "denied jury eligibility to persons who had conspired to deny the civil rights of blacks," Forman, *supra*, at 923, and the Civil Rights Act of 1875, which guaranteed black Americans the right to serve on juries, *id.* at 926, 930.

Throughout the debates over these pieces of legislation, the bills' proponents made clear that racial bias in jury decision-making was intolerable, running afoul of both the Sixth Amendment's guarantee of an "impartial" jury, U.S. Const. amend. VI, and the newly adopted Fourteenth Amendment's promise that all persons should enjoy the "equal protection of the laws," *id.* amend. XIV, § 1. Invoking the Constitution's guarantee that "every man shall have a trial by an impartial jury," Senator John Sherman of Ohio asked "what kind of trial would that be to which you would subject four millions of the people of the United States in the southern States, where by the law of some of them every man of that race is excluded from sitting as a juryman on a trial?" Cong. Globe, 42d Cong., 2d Sess. 844 (1872). And Senator Oliver Morton of Indiana asked "whether the colored men have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and

taught to believe that colored men have no civil and political rights that white men are bound to respect." 3 Cong. Rec. 1795 (1875) (statement of Sen. Morton). Answering his own question, Senator Morton explained that the "common sense of mankind [would] revolt at that proposition." *Id.* In sum, these debates reflected the strong conviction that the Constitution does not tolerate racial prejudice or bias in the administration of the nation's justice system.

This Court has also long recognized that racial bias in the administration of justice, including in jury decision-making, cannot be squared with our constitutional guarantee of impartial juries and equal protection under the law. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (plurality opinion) ("[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice"). Reflecting the importance of eliminating all racial bias from the administration of justice, the Court has repeatedly taken steps to eliminate purposeful racial discrimination at multiple stages of the jury selection process, holding for example that it is unconstitutional to discriminate against individuals in forming grand or petit juries. *See Strauder v. West Virginia*, 100 U.S. 303 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Hernandez v. Texas*, 347 U.S. 475 (1954). Significantly, the Court has also held that there are contexts in which it is permissible to question potential jurors about whether they harbor any racial prejudices. As this Court has noted, "if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Aldridge v. United States*, 283 U.S. 308, 314 (1931).

Notwithstanding this strong constitutional and historical commitment to the race-blind administration of justice, Peña Rodriguez was likely convicted of a crime by a jury in which someone "was shown to entertain a prejudice," *id.*, simply because Colorado's no-impeachment rule barred inquiry into what had happened in the jury room. This is wrong. Allowing Colorado's no-impeachment rule to trump Peña Rodriguez's Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to the equal protection of the laws would undermine our constitutional and historical commitment to race-blind jury deliberations. This Court should reaffirm that racial prejudice has no place in our justice system and hold that no-impeachment rules cannot be applied constitutionally in the context of allegations of racial bias.

ARGUMENT

THE COURT SHOULD HOLD THAT A NO-IMPEACHMENT RULE MAY NOT BAR EVIDENCE OF RACIAL BIAS OFFERED TO PROVE A SIXTH AMENDMENT VIOLATION

I. THE SIXTH AND FOURTEENTH AMENDMENTS TOGETHER REFLECT A CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Strongly rooted in the English common law, 4 William Blackstone, *Commentaries* *350 (jury is a "sacred bulwark" of liberty); *see* 3 *id.* at 379 ("the most transcendent privilege which any subject can enjoy,

or wish for, [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals[v]), this jury guarantee was of paramount importance to the Framers, who viewed it as a central feature of a system of ordered liberty, *see* Amar, *supra*, at 96-97 ("[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 558 (5th ed. 1891) (describing jury as "the great bulwark of [our] civil and political liberties").

As the Amendment's text makes clear, critical to the Framers' conception of a jury was the belief that members of the jury should be impartial, that is, free of bias toward or against any of the parties. At common law, the proscription against bias was commonly used to prohibit jurors from serving if they were related to one of the parties or had some other interest in the case. According to Blackstone, "[j]urors may be challenged *proper affectum*, for suspicion of bias or partiality. A *principal* challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." 3 Blackstone, *supra*, at 363; *see* 3 J.H. Thomas, *A Systematic Arrangement of Lord Coke's First Institute of the Laws of England* 365 (1836) ("He that is of a jury must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedom of

mind as he stands indifferent as he stands unsworn."). Chief Justice Marshall subsequently echoed these concerns about jury impartiality, explaining that "the most distant relative of a party cannot serve upon his jury" because "the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him." *Burr*, 25 F Cas. at 50; *id.* ("The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality.").

This longstanding constitutional commitment to impartial juries, together with the Fourteenth Amendment's guarantee of equal protection of the laws, also prohibits jurors who have a bias toward or against any of the parties because of the party's race. The original meaning of the Fourteenth Amendment's equal protection guarantee "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard). The constitutional guarantee of equality "protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." *Id.*

The Framers of the Fourteenth Amendment were particularly concerned about racial discrimination in the administration of criminal justice. In the aftermath of the Civil War, Southern states turned a blind eye to the daily "acts of cruelty, oppression and murder," *see Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xvii (1866), that Southern whites perpetrated to terrify

and intimidate the newly freed slaves and their allies. "Witness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations—and the impossibility of redress or protection . " Jacobus tenBroek, *Equal Under Law* 203-04 (1965). These experiences in the South "challenged" the "colonial belief that the jury was a bulwark of liberty." Forman, *supra*, at 909-10.

A key aspect of the problem was juror bias. Witnesses told the Joint Committee on Reconstruction that "since the surrender and coming home of the rebels, there is less chance for getting a jury who will act justly." *Report of the Joint Committee on Reconstruction* pt. 2, *supra*, at 33. Indeed, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites against blacks and Republicans." Forman, *supra*, at 909-10. According to the testimony of southern judges, "[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar." Cong. Globe, 42d Cong., 1st Sess. 158 (1871) (statement of Sen. Sherman quoting Judge Russel, 4th Dist.) (internal quotation marks omitted).

Over the course of Reconstruction, the Framers of the Reconstruction Amendments repeatedly acted to ensure the existence of impartial juries that would fairly apply the law to all regardless of race. Recognizing that juror bias violated both the Sixth Amendment's guarantee of an "impartial jury" and the Fourteenth Amendment's promise that no person would be denied "equal protection of the laws," U.S.

Const. amend. XIV, § 1, Ohio Senator John Sherman called for action to enforce these constitutional guarantees, stating that some sort of response was necessary if the United States "intend[ed] to retain a republican form of government." Cong. Globe, 42d Cong., 1st Sess. 157 (1871). Action first came in the form of the Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.). Although the "principal targets" of the Act were "the Klan itself and the violence it perpetuated," Forman, *supra*, at 920, proponents of the legislation also sought to address the Southern state governments' failure to punish the Klan, Cong. Globe, 42d Cong., 1st Sess. App. 252 (1871) (statement of Sen. Morton) ("None of its members have been punished "). As Senator Sherman noted, "there is another remarkable feature of this whole proceeding, and that is that from the beginning to the end in all this extent of territory no man has ever been convicted or punished for any of these offenses, not one." Cong. Globe, 42d Cong., 1st Sess. 157-58 (1871).

Proponents of the legislation recognized that a principal reason why Klan members went unpunished "was the failure of Southern juries to punish violence against blacks and Republicans." Forman, *supra*, at 921; *see, e.g.*, Cong. Globe, 42d Cong. 1st Sess. 158 (1871) (Judge Settle of the North Carolina Supreme Court explaining that "[t]he defect lies not so much with the courts as with the juries"). As one scholar reports, "Ku Klux Klan members candidly acknowledged their willingness to disobey the law as jurors in defense of one another." Forman, *supra*, at 921; *id.* (quoting Klansman who explained that "if we could get on the jury we could save [the defendant]"). Thus, Section 5 of the Act "denied jury eligibility to

persons who had conspired to deny the civil rights of blacks, and provided for penalties for those who perjured themselves during jury selection." *Id.* at 923.

The Act produced marked successes, excluding prejudiced whites from juries and allowing black Americans to take their place; as a result, Klan members were convicted in large numbers for the first time. *Id.* at 925. Although the federal government ultimately "scale[d] back its Klan prosecutions," *id.* at 926, these early successes of the Act helped demonstrate that the problem was, as Judge Settle had noted, "not so much with the courts as with the juries," Cong. Globe, 42d Cong., 1st Sess. 158 (1871).

The Civil Rights Act of 1871 was not the only Reconstruction-era legislation introduced to address the problem of Southern juries that were infected by racial bias. In 1870, Senator Charles Sumner of Massachusetts introduced legislation to "prohibit[] discrimination in the selection of jurors and provid[e] penalties for officials who disobeyed." Forman, *supra*, at 926; *see id.* at n.160 ("no person shall be disqualified for service as juror in any court, national or State, by reason of race, color, or previous condition of servitude" (quoting S. 916, 41st Cong. § 4 (1870))).[2]

During debates over Sumner's proposed legislation, proponents of the bill made clear that jury deliberations free of racial bias were central to the con-

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[2] Notably, some calls for black Americans to be able to serve on juries came even earlier, and these calls, too, stressed the need to eliminate racial prejudice from the justice system. *See, e.g.*, Forman, *supra*, at 916 (discussing Representative William Kelley of Pennsylvania reading into the record in 1865 an editorial by the black *New Orleans Tribune*, which asked, "Why have we no representatives on the jury? Are our lives, honor, and liberties to be left in the hands of men who are laboring under the most stubborn and narrow prejudice?").

stitutional guarantee of impartial juries.[3] According to many supporters of the bill, the right to serve on a jury was not an "independent right, but one that stemmed from the defendant's right to a fair trial." Forman, *supra*, at 927; *see* Cong. Globe, 42d Cong., 2d Sess. 845 (1872) (statement of Sen. Sherman) ("it is the right of all men to have a fair law and rule by which men of their own race and occupation and color may serve on a jury"). Indeed, proponents of the legislation repeatedly made clear that a jury could not be impartial if blacks could not serve. As Senator Sherman noted, "[t]he Constitution of the United States declares that every man shall have a trial by an impartial jury—not of his peers, in the old language of the English law, but an impartial jury. The meaning is the same. Now, what kind of trial would that be to which you would subject four millions of the people of the United States in the southern States, where by the law of some of them every man of that race is excluded from sitting as a juryman on a trial? Is that an impartial jury?" *Id.* at 844 (statement of Sen. Sherman).

Senator Morton also referenced the Framers' commitment to an impartial judiciary and the relevance of that concept to contemporary debates about the racial composition of juries: "[O]ne of the most important principles of the common law that has

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[3] Even some opponents of the legislation acknowledged the importance of jury impartiality. Senator Stevenson, for example, believed blacks would be treated fairly by all-white juries, but expressed concern about whether the same could be said for members of other minority groups. "What becomes of a Chinamen who commits murder today in San Francisco or Sacramento?" he asked. "What right of justice can he expect from twelve white men prejudiced against him and opposed bitterly to the immigration of his people?" Cong. Globe, 42 Cong., 2d Sess. 913 (1872) (statement of Sen. Stevenson).

come down to us from our fathers, established in England long ago, was that every man had a right to be tried by his peers. And we see how carefully this principle of trial by jury is guarded. Now, I ask if with the prejudices against the colored race entertained by the white race, even in some of the Northern States and certainly in all of the Southern States, the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his right to property must be made up exclusively of the white race?" 3 Cong. Rec. 1793 (1875) (statement of Sen. Morton).

Senator George Edmunds of Vermont made a similar point, stressing the importance of allowing black Americans to serve on juries to ensure the equality they had just been guaranteed by the Fourteenth Amendment:

> What, sir, is more necessary to peace and security in the administration of justice in the southern States than that [colored people] should have the constitutional right to participate in the administration of justice? Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgment by his peers, if you are to say that the jurors are to be composed of the Ku Klux, and that the only status the colored man shall have in court, shall be that he shall stand either as a respondent or it may be as a witness? You are to put him into the hands of his enemies for trial.

Cong. Globe, 42d Cong., 2d Sess. 900 (1872) (statement of Sen. Edmunds); *see id.* at 847 (statement of Sen. Morton) ("Take the case of the State of Kentucky

where colored men are not allowed to sit upon a jury. A colored man is placed upon trial. He is to be tried by a jury of white men, perhaps for a wrong inflicted upon a white person. He is to be tried by a jury that have prejudices of race against him, that are now especially, and have been for a few years past excited against him because he has been attempted to be clothed with new rights. I ask if this colored man, to be tried by a jury of white men from which all colored men are excluded, can be said in any sense to have 'the equal protection of the law?'"); *id.* at 898 (statement of Sen. Morton) ("[I]f a quarter of a million of colored men in Kentucky have no right to sit upon a jury, it cannot be said that they have the equal protection of the laws It is class legislation of the worst kind.").

Other members of Congress also spoke about the difficulties in securing justice for both black plaintiffs and defendants, saying, "Every colored man suing for his wages brings his case before a jury who are prejudiced against him because of his color. Every colored man tried as a criminal appears before a jury who are inclined to believe him guilty because of his race " 2 Cong. Rec. 427 (1874) (statement of Rep. Stowell); 3 Cong. Rec. 1863 (1875) (statement of Sen. Morton) ("[T]o give the exclusive right to white men to sit upon juries and to adjudicate upon the rights of colored men is denying to colored men the equal protection of the laws, because it is placing the adjudication of their rights exclusively in the hands of another race, filled with a prejudice and passion in many States that would prevent them from doing justice."). One Senator even invoked Justice Strong who in 1874 spoke from the bench about the inability of black Americans to receive a fair trial: "It is also well known that in many quarters prejudices existed

against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused." 2 Cong. Rec. 4148 (1874) (statement of Sen. Howe) (quoting *Blyew v. United States*, 80 U.S. 581, 593 (1871)); *see* Cong. Globe, 42d Cong., 2d Sess. 489 (1872) (statement of Sen. Sawyer) (expressing the hope that Senator Sumner's bill would provide a "remedy for" the fact that there were probably cases "where judges and juries fail to prove the guardians of the colored man's rights and privileges which it behooves them to be").

During debates over Senator Sumner's bill, black Americans living in the South also advised members of Congress that "it is almost if not quite impossible for a black man to obtain justice" in Southern courts because "the lives, liberties, and property of black men have been decided by grand and petit juries composed exclusively of white men who are their political opponents." Message from the President of the United States, Transmitting a Memorial of a Convention of Colored Citizens Assembled in the City of Montgomery, Ala. on December 2, 1874, H. Exec. Doc No. 46, at 4-5 (1874). They elaborated that

> from the antipathies and prejudices of race, which are generally inflamed by artful and sometimes by undisguised appeals by counsel to these passions, it results that our race is deprived of their constitutional right under the constitution of the State to a trial by an 'impartial jury,' and of our right under the 13th and 14th amendments to the Constitution of the United States 'to the equal protection of the laws.'

Id. at 5; *id.* ("Our lives, liberties, and properties are made to hang upon the capriciousness, perilous, and prejudiced judgments of juries composed of a hostile community of ex-slaveholders who disdain to recognize the colored race as their peers in anything, who look upon us as being *by nature an inferior race*, and by right their chattel property"); *id.* at 8 ("When this mode of trial becomes, as it has, in this State, the trial of a black man or his rights before a jury composed exclusively of a different and a hostile race, having no sympathies with him, but race antipathies and prejudices against him, it becomes worse than a mockery, and is the surest means of accomplishing his ruin and the subversion of right and justice.").

The day before the Senate finally passed Senator Sumner's bill, what became the Civil Rights Act of 1875, Senator Morton gave a rousing speech in which he captured the spirit of the legislation. In response to an opponent of the bill, Senator Morton asked

> whether the colored men have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.

3 Cong. Rec. 1795 (1875) (statement of Sen. Morton). In answer to his own question, Senator Morton responded that the "common sense of mankind [would] revolt at that proposition" that black men actually have the equal protection of the laws in such a scenario. *Id.*; *see also id.* at 1864 (statement of Sen. Morton) ("[T]o place the administration of the law ex-

clusively in the hands of white men is to deny to colored men an equal protection of the laws").

In sum, as this history indicates, the constitutional commitment to "impartial" juries, as reflected in the text of the Sixth Amendment, as well as the constitutional guarantee of equal protection contained in the Fourteenth Amendment, have long been understood to require juries that are not infected by racial prejudice and bias. As the next Section discusses, this deep historical commitment has long been reflected in this Court's cases as well.

II. THIS COURT'S CASES HAVE LONG REFLECTED THE IMPORTANCE OF RACE-BLIND DECISIONMAKING IN THE JURY CONTEXT

This Court has long recognized that racial prejudice in the jury system violates both the Sixth and Fourteenth Amendments because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Mitchell*, 443 U.S. at 555 (plurality opinion); *id.* at 556 ("[S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'" (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940) (footnote omitted))).

Five years after the passage of the Civil Rights Act of 1875, this Court confirmed the Framers' understanding of the constitutional guarantee of equality, holding that a state statute excluding African Americans from jury service "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to se-

cure to all others." *Strauder*, 100 U.S. at 308. *Strauder* recognized that "[t]he very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine" and that "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.* at 308, 309. The "apprehension that through prejudice [racial minorities] might be denied equal protection," *id.* at 309, has guided this Court's jurisprudence since.

To guard against racial discrimination in the justice system, this Court has repeatedly recognized the importance of eliminating purposeful racial discrimination at all stages of the jury selection process. For example, the Court "has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury from which all persons of his race or color have, solely because of that race or color, been excluded by the State." *See Castaneda v. Partida*, 430 U.S. 482, 492 (1977) (quoting *Hernandez*, 347 U.S. at 477); *Cassell v. Texas*, 339 U.S. 282, 282-83 (1950) (violation of the "federal constitutional right to a fair and impartial grand jury" when an African American was indicted by a grand jury from which African Americans were "intentionally excluded"). As a plurality of the Court recognized in *Rose v. Mitchell*, 443 U.S. 545 (1979), excluding members of a particular race from the grand jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" and "strikes at the fundamental value of our judicial system and our society as a whole." *Mitchell*, 443 U.S. at

555-56; *see also Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (reaffirming *Rose* and calling "intentional discrimination in the selection of grand jurors" a "grave constitutional trespass").

Similarly, this Court has held that discrimination in selecting the petit jury pool is constitutionally impermissible based on both the Fourteenth Amendment and the Sixth Amendment right to a jury reflecting a fair cross section of the community. *See, e.g., Taylor*, 419 U.S. 522. In *Taylor*, the Court reversed the petitioner's conviction because the state court that tried him had engaged in a pattern of excluding women from the jury pool even though women constituted fifty-three percent of the population. As the Court explained, "[t]he purpose of a jury is to guard against the exercise of arbitrary power . This prophylactic vehicle is not provided if large, distinctive groups are excluded from the pool." *Taylor*, 419 U.S. at 530 (citation omitted); *id.* ("'[T]he broad representative character of the jury should be maintained as assurance of a diffused impartiality . '" (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))). Although the Court subsequently restricted the fair cross section right to the selection of the jury venire (and not the petit jury itself), *Holland v. Illinois*, 493 U.S. 474 (1990), in doing so the Court reaffirmed *Taylor*'s central premise that the Sixth Amendment prohibits jury pools likely to have a bias against certain classes of defendants. As the Court explained, "[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring an *impartial* [jury] Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill dis-

posed towards one or all classes of defendants "
Holland, 493 U.S. at 480.

The Court has also provided safeguards to try to ensure that individuals who sit on juries carry no racial bias or animus that will conflict with their ability to serve as impartial jurors. In *Aldridge v. United States*, 283 U.S. 308 (1931), the defense asked the trial judge to question prospective jurors about their racial attitudes after learning that in an earlier trial of the same case, a white juror had expressed that the interracial nature of the crime "perhaps somewhat influenced her." *Aldridge*, 283 U.S. at 310. Despite this revelation, the judge forbade the defense counsel from asking any questions about race. This Court held that this decision was erroneous, reasoning that "if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314. Notably, the Court rejected an argument that questioning jurors about their racial attitudes would undermine the legitimacy of the judicial system, explaining that

> [w]e think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Id. at 314-15; *see Ham v. South Carolina*, 409 U.S. 524, 527 (1973) ("the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias").

In the years since, even as the Court has made clear that trial courts enjoy discretion when determining whether to permit questioning about potential jurors' racial biases, they can abuse their discretion by denying a defendant's request to examine jurors if there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case." *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981); *see Turner v. Murray*, 476 U.S. 28, 36, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected," and "[b]y refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury"). As this Court has explained, juror questioning can be required when there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'" *Ristaino v. Ross*, 424 U.S. 589, 596 (1976) (quoting Coke on Littleton 155b (19th ed. 1832)).

Finally, the Court has also prohibited the exclusion of prospective jurors based on race even when the government otherwise has the discretion to remove jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court explained that discriminatory selection of jurors was unconstitutional because, among other things, it denies defendants the equal protection of the laws. "Those on the venire must be indifferently chosen," the Court explained, "to secure the defendant's right under the Fourteenth Amendment to protection of life and liberty against race or color prejudice." *Batson*, 476 U.S. at 86-87 (internal quotation marks and citations omitted).

The Court also underscored that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87; *see Foster v. Chatman*, 136 S. Ct. 1737, 1745-1747 (2016) ("The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (quoting *Snyder v. Lousiana*, 552 U.S. 472, 478 (2008))).

In short, this Court has repeatedly made clear that racial bias and prejudice are an affront to the constitutional guarantees contained in both the Sixth and Fourteenth Amendments, and that there is no place for such bias in either jury deliberations or in the administration of our justice system more generally.

III. APPLYING STATE NO-IMPEACHMENT RULES IN THE CONTEXT OF ALLEGATIONS OF RACIAL BIAS UNDERMINATES OUR CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT

As just discussed, there is a longstanding constitutional and historical commitment to race-blind decision-making in the jury context, and this Court's decisions have repeatedly reflected that commitment. Applying no-impeachment rules in cases, like this one, in which there are allegations of racially prejudiced comments during jury deliberations is at odds with this constitutional commitment and should not be permitted.

The evidence that racial prejudice and bias infected jury deliberations in this case is striking. After the jury returned its verdict convicting Peña Rodriguez, two jurors reported to defense counsel that, during deliberations, another juror had made a num-

ber of statements indicating that he was prejudiced against Mexicans and individuals of Hispanic descent. According to the jurors who spoke to defense counsel, the other juror said that the defendant "'did it because he's Mexican and Mexican men take whatever they want,'" Pet. App. 4a, and that the defendant "'was guilty because [in that juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women,'" *id.*; *see id.* ("'[W]here [that juror] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.'"). These jurors also reported that the other juror stated that the defendant's alibi witness was not "credible because, among other things, he was an 'an illegal.'" *Id.* at 4a-5a (internal quotation marks omitted). Notably, the alibi witness had testified during trial that he was a legal resident of the United States. Pet'r's Br. 8.

As this Court has made clear, "a defendant has the right to an impartial jury that can view him without [the] racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). If these juror allegations are true, Peña Rodriguez's right to such an impartial jury and to the equal protection of the laws was plainly violated given the juror's preconceptions about Mexicans and Hispanics and his biases against them.

Colorado's asserted justifications for its no-impeachment rule, whatever their merits as a general matter, cannot trump Peña Rodriguez's constitutional right to an impartial jury capable of deciding his case based purely on the evidence presented at trial. *See* Pet'r's Br. 33-39; *see also id.* at 38 ("Given the existing exceptions to [the no-impeachment rule],

a narrow exception for allegations of racial bias does not unduly disturb the finality of verdicts."); Amicus Br. of NAACP Legal Defense & Educational Fund, Inc. et al. 17-19. Moreover, as Peña Rodriguez's brief demonstrates, there is no need to abandon no-impeachment rules altogether; rather, the courts could easily administer an exception to no-impeachment rules for racial bias claims. *See* Pet'r's Br. 29-31, 40-45; *see also id.* at 30 (noting that "over twenty jurisdictions allow juror testimony about racially biased remarks in the jury room"). Such an exception would help safeguard our nation's longstanding commitment to a race-blind justice system that judges people based on the evidence presented at trial, not the color of their skin. It would also ensure that "prejudices against particular classes in the community" do not "sway the judgment of jurors" and deny to racial minorities "the full enjoyment of that protection which others enjoy." *Strauder*, 100 U.S. at 309. As this Court has explained, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Mitchell*, 443 U.S. at 555. This Court should hold that courts cannot apply no-impeachment rules in contexts in which doing so would allow verdicts based on racial discrimination to stand, and it should hold that the Colorado Supreme Court was wrong to do so here.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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